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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Denied

No. 1049

FEDERAL DEPOSIT INSURANCE CORPORATION,
RECEIVER OF THE PARKSLEY NATIONAL BANK,
Petitioner,

vs.

S. C. WHITE, A. J. REW, G. WALTER MAPP, EMMA P. PARSONS, C. B. ROSS, S. F. PARKS, AND J. BROOKS MAPP AND MARGARET BELL CHANDLER, ADMINISTRATORS OF THE ESTATE OF JOHN W. CHANDLER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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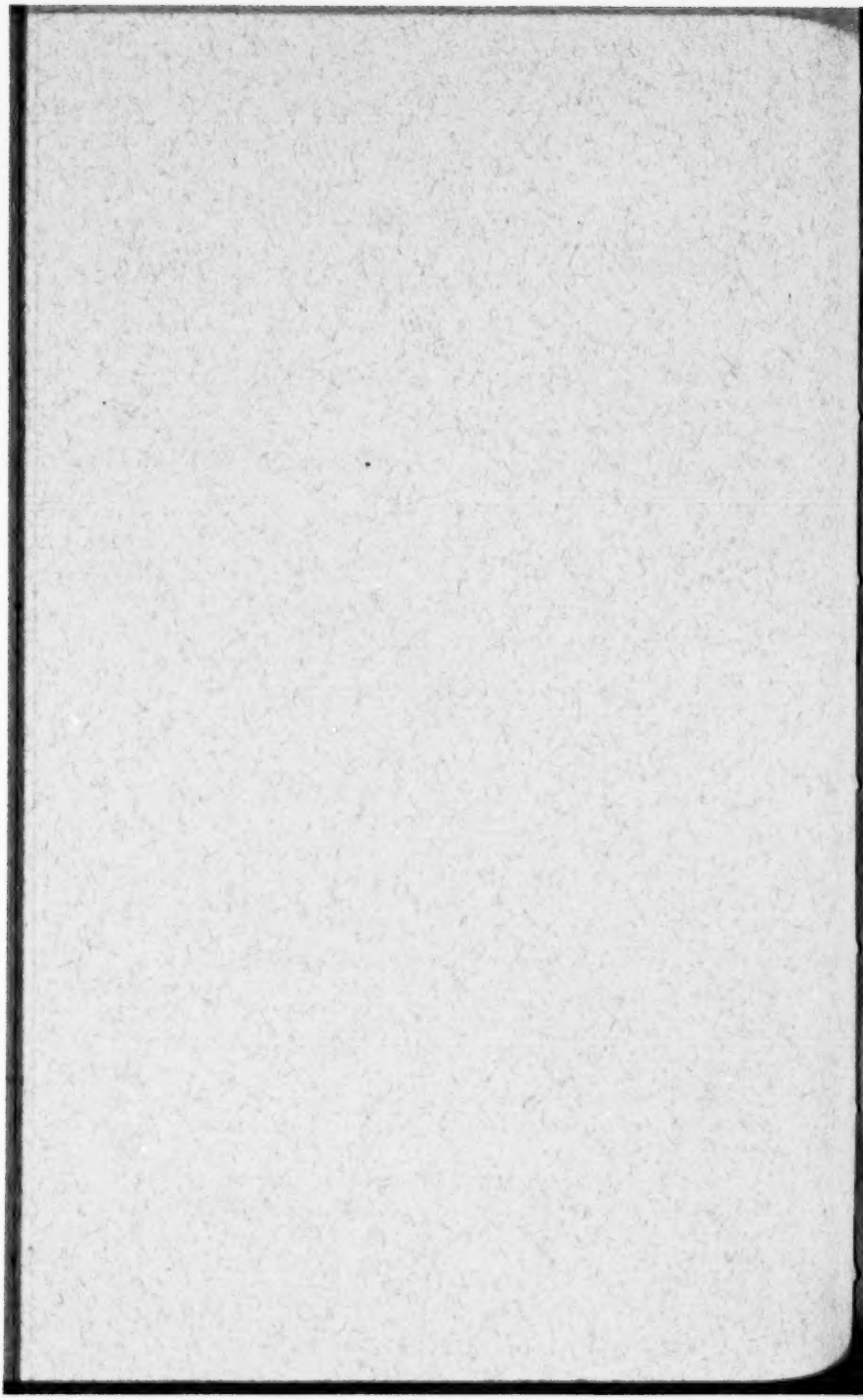

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S. C. WHITE, A. J. REW, G. WALTER MAPP, EMMA P. PARSONS, C. B. ROSS, S. F. PARKS, AND J. BROOKS MAPP AND MARGARET BELL CHANDLER, ADMINISTRATORS OF THE ESTATE OF JOHN W. CHANDLER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Federal Deposit Insurance Corporation, Receiver of the Parksley National Bank, Parksley, Virginia, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above case on September 10, 1941 (R. 246), and the order entered on December 18, 1941 (R. 257), denying the rehearing thereof.

Opinions Below.

The opinion of the Circuit Court of Appeals rendered September 10, 1941 (R. 236-245), affirming in part and reversing in part the judgment of the United States District Court for the Eastern District of Virginia, is reported at 122 F. (2d) 770. Petition for rehearing filed by appellee on October 7, 1941 (R. 246-254), was denied with per curiam opinion rendered December 18, 1941 (R. 256-257), reported at 124 F. (2d) 429.

Memorandum opinion of the United States District Court after trial on the merits is not reported but appears in the record at pages 158-161.

Jurisdiction.

The order of the Circuit Court of Appeals denying rehearing was filed December 18, 1941.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Section 1 (U. S. C., Title 28, Sec. 347 (a)).

Summary Statement of Matters Involved.

Undisputed Facts.

For many years prior to 1933, the Parksley National Bank of Parksley, Virginia (hereinafter called the bank) a national banking association (R. 24) conducted a banking business in Parksley, Virginia (R. 35). The bank was among those not permitted to reopen at the termination of the banking holiday proclaimed by the President of the United States on March 6, 1933 [1] closing all banking institutions in the country (R. 7, 12, 18, 36). On May 10, 1933,

[1] Proclamation No. 2039 and Proclamation No. 2040 continuing the holiday, the text of both appearing in the notes following U. S. C. Title 12, Sec. 95.

the Comptroller of the Currency appointed S. C. White (who had been cashier and a director of the bank) (R. 51) conservator of the bank [2] (R. 36). While the bank was in conservatorship, the directors of the bank (who are the respondents here (R. 1, 6, 10, 16, 21) and who owned about 85% of the bank's stock (R. 141)) appointed three of their members as a committee (hereinafter called the reorganization committee) to conduct negotiations looking toward reopening the bank (R. 91). At the insistence of the reorganization committee (R. 168) a plan of reorganization was submitted to the Comptroller of the Currency, the terms and conditions of which contemplated inter alia that the shareholders would make "an unconditional voluntary contribution of $50,000" which would rehabilitate the bank's capital structure and enable it to "eliminate" assets classified as slow, doubtful or worthless, including approximately $62,000 face value of bills receivable and other miscellaneous assets (R. 167-169). This plan was approved by the Comptroller of the Currency (R. 169) on May 27, 1933.[3] (R. 167).

On July 15, 1933, Conservator White certified to the Comptroller of the Currency "that the sum of $50,000 has been voluntarily contributed for the rehabilitation of the capital structure" (R. 172A). In reliance thereon and effective July 19, 1933, the Comptroller of the Currency terminated the conservatorship of the bank [4] (R. 173-174) on which date White, in his capacity as conservator, returned to the board of directors of the bank all of the assets of the bank (R. 174A) including those to be "eliminated" (hereinafter called unacceptable assets) in accordance with

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[2] Pursuant to the provisions of Sec. 203 of the Act of Mar. 9, 1933, 48 Stat. 2, U. S. C. Title 12, Sec. 203.

[3] Pursuant to the provisions of Sec. 207 of the Act of Mar. 9, 1933, 48 Stat. 3, U. S. C. Title 12, Sec. 207, text at pp. 24-5, *infra*.

[4] Pursuant to the provisions of Sec. 205 of the Act of Mar. 9, 1933, 48 Stat. 3, U. S. C. Title 12, Sec. 205, text at pp. 23-4, *infra*.

the terms and conditions of the reorganization plan (R. 52), White resuming his functions as cashier and director (R. 36). The unacceptable assets were charged off on the books of the bank on July 19, 1933 (R. 52, 56), and thereafter collections from the unacceptable assets as well as recoveries on assets previously charged off on the books of the bank were credited by White to a checking account maintained in the bank's individual deposit ledger under the caption "S. C. White, Special D" (R. 61, 212). The collections thus credited totalling $13,132.17 (R. 72, 215-218) were disbursed by White for and to the use or benefit of the directors (R. 61, 78) who alone (rather than all shareholders) made the $50,000 voluntary cash contribution (R. 25).

During the period between the reopening of the bank in July 1933 and its suspension in May 1939, the bank submitted to the Comptroller of the Currency as required by statute [5] eleven reports of its earnings and dividends (Ptf's Exh. No. 8 (R. 50, 177-200)), all of which were attested to by Cashier White and each of which contained a $50,000 entry on line 24 described as "Voluntary contributions to surplus or profits".

Under date of April 28, 1936, Deputy Comptroller of the Currency Gough addressed a letter to the Board of Directors of the bank (Ptf's Exh. No. 10 R. 202-204) in which it was stated that the examiner who conducted an examination of the bank on March 4, 1936, had advised that certain shareholders who contributed $50,000 to rehabilitate the capital were taking the position that they purchased the unacceptable assets and that they should receive recoveries thereon, which position was contrary to the conditions imposed by the Comptroller of the Currency when he approved

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[5] R. S. 5212, U. S. C. Title 12, Sec. 163.

the plan of reorganization. Deputy Comptroller Gough further stated:

> "Therefore, no assets should have been transferred to or held in trust for these shareholders; and if such assets have been set aside, recovery on them should go to the bank." (R. 203)

Deputy Comptroller Gough's letter was received at the bank (R. 51, 81) but the criticism or admonition contained therein concerning the unacceptable assets was not heeded (R. 81-82).

The bank continued its operations until May 18, 1939 (R. 2, 6, 11, 16), when it was closed because of inability to meet the demands of its depositors and petitioner was appointed receiver [6] (R. 201).

When petitioner (by its liquidator) took charge of the affairs of the bank as receiver, most of the remaining unacceptable assets were found by petitioner's liquidator in a sealed envelope among the effects of the bank (R. 85).

Proceedings in and Rulings of Courts Below.

On January 11, 1940 (R. 1), petitioner [7] instituted this action against respondents [8] praying that (a) the Court determine by way of declaratory judgment the assets of the bank to which petitioner as receiver was entitled; (b) respondents be required to pay and deliver the said assets to petitioner together with any collections received thereon by the respondents or their agents, together with interest

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[6] Pursuant to the provisions of the Act of Aug. 23, 1935, Sec. 101, subsection (1) (3), 49 Stat. 694, U. S. C. Title 12, Sec. 264 (1) (3).

[7] Pursuant to its statutory duty as prescribed in subsection (1) (4) of Section 101 of the Act of Aug. 23, 1935, 49 Stat. 694, U. S. C. Title 12, Sec. 264 (1) (4) reading in part—"It shall be the duty of the Corporation as such receiver to realize upon the assets of such closed bank,—".

[8] As an action involving the winding up of the affairs of a National Banking Association as provided by Par. 15, Sec. 563 R. S. and Paragraphs 10 and 11 of Sec. 629 R. S. as amended by the Act of Mar. 3, 1911, 36 Stat. 1092, U. S. C. Title 28, Sec. 41 (16).

thereon; (c) respondents be permanently enjoined and restrained from disposing of or attempting to make collections on account of any of the assets of the bank; (d) respondents and each of them be required to account for all assets of the bank, together with payments received thereon by them or for their account, together with interest; (e) respondents be enjoined from taking any step or performing any act which would change the status of any of the assets of the bank (R. 4-5). The answers filed by the several respondents asserted that the real subject matter of the complaint was the title to the unacceptable assets (R. 7, 12, 18) and that according to the terms of an alleged agreement, contract or understanding had by the reorganization committee with representatives of the Comptroller of the Currency and/or the Federal Reserve Bank of Richmond and/or the Reconstruction Finance Corporation, the unacceptable or "eliminated" assets were to become the property of the persons making the $50,000 contribution toward the capital rehabilitation (R. 8-9, 13-14, 18-19, 21-22).

In a pretrial conference held on May 27, 1940, an order was entered (R. 23-25) providing that the only issue to be submitted to the jury would be the question of whether petitioner or respondents were entitled to the unacceptable assets and the collections thereon (R. 24-25).

Thereafter, and on the date the case was set for trial, and over objection by petitioner's counsel, the court permitted respondents to file separate amended answers (R. 33-34) in which each of them pleaded the Virginia 5-year general statute of limitations [9] as to $11,071.70 in collections made more than 5 years prior to the bringing of suit, or in the alternative the Virginia 3-year general statute of limitations [9] as to $11,851.52 in collections made more than 3 years prior to the bringing of suit (R. 26-31). Laches

[9] Sec. 5810 Code of Virginia, the text of which appears in the appendix, p. 23, *infra*.

was also set up by way of defense in the amended answers (R. 26-32). The Court, however, reserved decision upon the legal sufficiency of the pleas (R. 34) and petitioner's counsel then moved to strike the pleas (R. 34-35) the court also reserving decision on this motion (R. 35).

Petitioner rested its case in chief (R. 83) after proving the undisputed facts set out supra, pp. 2-5. Respondents then undertook to prove that the bank was reopened in July, 1933, pursuant to an agreement which contemplated that the unacceptable assets would become the property of those contributing to the capital rehabilitation (R. 92). On objection of petitioner's counsel to the introduction of this line of evidence (R. 92), the jury was retired from the courtroom (R. 93) whereupon respondents tendered evidence that the contributions to the capital rehabilitation were made by the respondents with the understanding that they would become the owners of the unacceptable assets (R. 93-97, 123, 124). All of the evidence so offered on objection of petitioner's counsel was rejected by the trial court as being in violation of the parol evidence rule, i.e. proffered for the purpose of varying the written official record of the Comptroller of the Currency with respect to the ownership of the assets (R. 121-122).

When the court indicated that it would enter a declaratory judgment to the effect that the unacceptable assets belonged to the bank, a short discussion ensued wherein the remaining issues, viz: applicability of the statute of limitations, as well as questions of agency and interest, were specified (R. 130).

After the jury returned to the courtroom, the only witness placed on the stand by respondents was S. C. White (R. 132) (former director-cashier-conservator), who testified that there were about 15 non-director shareholders of the bank owning approximately 15% of the capital stock (R. 141), all of whom were aware that the directors "had

bought these charged-off assets in July, 1933"(R. 138), and that

> "• • • We had from two to three examinations each year from 1933 until the bank closed, and part of that time the chief National Bank Examiner put us on a list of special examinations. There was no criticism ever stated in there. I am speaking of the reports by the Examiner. There wasn't anything, whatsoever, regarding the charged-off items of 1933" (R. 136).

None of the evidence previously offered by respondents and rejected by the court was retendered.

Motions for directed verdict were made on behalf both of respondents (R. 151) and of petitioner (R. 152). The court held as a matter of law that the unacceptable assets at all times remained the property of the bank and directed the jury to return a verdict in favor of the plaintiff for the aggregate of the sums shown by the evidence to have been realized by respondents from the assets since July, 1933, less proper credits, plus interest, and to close the verdict with the clause "Subject to the Court's later determination on the pleas of the statute of limitation" (R. 154).

The jury returned a verdict for petitioner in the sum of $13,132.17 with interest, with the above quoted qualifying clause as directed by the Court (R. 156-157), whereupon respondents filed motions to set aside the verdict or to grant a new trial (R. 157-158).

Later, the Court overruled respondents' motion for new trial (R. 164) and rejected respondents' several pleas of the statutes of limitations and laches (R. 164). In its memorandum opinion, the trial court not only held, as a matter of law, that a court of equity should not

> "Under the circumstances—permit defendants to plead the statute of limitations or laches in • • • an equity action against them for an accounting • • •" (R. 160).

but also in effect found as a fact that there was

> "* * * a lack of evidence showing unequivocal action on their part that was open, hostile and adverse to continued ownership by the bank of the assets in controversy" (R. 159).

Respondents appealed (R. 165) and the Court of Appeals affirmed the decision of the trial court insofar as it held that the bank retained title to and ownership of the unacceptable assets (R. 239-240), but then reversed the decision and judgment of trial court by holding that the Virginia statute of limitations was applicable and barred petitioner's right of action (except as to one item of recovery, viz: $1,009.33) because

> "there was knowledge on the part of all the stockholders, * * * any of whom could have brought suit on behalf of the bank" (R. 242)

and

> "there was actual knowledge also, on the part of the bank examiners representing the Comptroller of the Currency" (R. 242) "* * * who had 'ample power to compel restitution, resignation, or a receivership'" (R. 243) * * * "and the Federal Deposit Insurance Corporation (*which*) was given ample power to protect itself and the public" (R. 242). (Italics supplied.)

Petitioner filed a petition for rehearing, or in the alternative, for modification of the opinion of the Court of Appeals or for remand of the cause for a partial new trial (R. 246-254), asserting as grounds therefor inter alia that the case was tried and treated not only by the parties but also by the trial court as one presenting an issue of law with respect to the applicability of the statute of limitations to this case, rather than an issue of fact, and that the court decided important questions of law concerning remedies or sanctions available to federal bank supervising agencies probably in conflict with Federal Banking Laws.

The appellate court denied the petition for rehearing but modified its former judgment by directing the trial court to determine the applicability of the statute of limitations to certain collections which petitioner asserted are in the same category as the aforesaid excepted $1,009.33 item (R. 256-257).

Statutes Involved.

Section 5810 Virginia Code of 1936—Limitation of personal actions generally, quoted in Appendix infra, p. 23.

Section 205 of the Emergency Banking Act (Act of March 9, 1933), 48 Stat. 3, U. S. C. Title 12, Section 205, quoted in the Appendix infra, pp. 23-24.

Section 207 of the Emergency Banking Act (Act of March 9, 1933), 48 Stat. 3, U. S. C. Title 12, Section 207, quoted in the Appendix infra, pp. 24-25.

Subsection (1) (4) of Section 101 of the Act of August 23, 1935, 49 Stat. 694, U. S. C. Title 12, Section 264 (1) (4), a pertinent portion of which is quoted in footnote 14, p. 15 infra.

R. S. 5239 as amended by the Act of March 3, 1911, 36 Stat. 1167, U. S. C. Title 12, Section 93, quoted in full in Appendix infra, p. 25.

R. S. 5240 as amended by the Acts of February 19, 1875, 18 Stat. 329, and December 23, 1913, 38 Stat. 271, U. S. C. Title 12, Section 484, quoted in full in footnote 16, p. 17 infra.

Section 30 of the Act of June 16, 1933, 48 Stat. 193 U. S. C. Title 12, Section 77, quoted in full in Appendix infra, pp. 26-27.

Subsection (i) (1) of Section 101 of the Banking Act of 1935 (Act of August 23, 1935), 49 Stat. 690, 691, U. S. C. Title 12, Section 264 (i) (1), quoted in full in Appendix infra, pp. 27-28.

Specification of Errors to be Urged.

The Circuit Court of Appeals for the Fourth Circuit erred:

(1) In failing to hold that respondents are estopped as a matter of federal public policy to plead statutes of limitations or laches;

(2) In holding and deciding that knowledge acquired by federal bank examiners which is not communicated to their superiors is nevertheless imputed to the Comptroller of the Currency and to the Federal Deposit Insurance Corporation so as to set in motion the statute of limitations of the State against an insured national bank or its statutory receiver and in favor of offending directors;

(3) In holding and deciding that the Comptroller of the Currency had the power to compel respondents to restore the unacceptable assets and that the failure of the Comptroller to compel respondents to resign or to place the bank in receivership within the period prescribed by the statute of limitations of the State barred this action by the statutory receiver of the bank;

(4) In holding and deciding that the Federal Deposit Insurance Corporation had ample power to protect itself and the public and that its failure to exercise this power within the period prescribed by the statute of limitations of the State barred this action by the statutory receiver of the bank;

(5) In holding and deciding that knowledge acquired by non-director shareholders of the bank (who, together with respondents were to contribute to the bank's capital rehabilitation under the reopening requirement laid down by the Comptroller that there be an "unconditional voluntary

cash contribution by shareholders") was imputable to the bank where it was to the interest of the independent non-contributing shareholders to permit respondents to appropriate the unacceptable assets rather than to bear their proportion of the contributions;

(6) In reversing the judgment of the District Court and rendering judgment for respondents on the ground that issues of fact are determinative of the case where the District Court and the parties tried the case as one presenting an issue of law (i. e., whether respondents are estopped to plead statutes of limitations or laches);

(7) In failing to remand the case for new trial so that the issues of fact considered by the Court of Appeals to be determinative of the case could be resolved on full opportunity to all parties to examine and produce competent evidence;

(8) In finding facts considered to be determinative of the case from incomplete, hearsay and excluded evidence;

(9) In assuming in the absence of proof that the Comptroller of the Currency and the Federal Deposit Insurance Corporation did not perform their duties;

(10) In not confining its judgment to items encompassed in respondents' pleas, viz.: Collections made more than 5 years prior to the bringing of this suit;

(11) In not accepting the trial court's finding that respondents' possession of the unacceptable assets was not open, hostile and adverse to the bank;

(12) In not holding and deciding that respondents had the burden of proving facts necessary to sustain the affirmative defenses of statute of limitations and laches and that respondents did not meet that burden;

Questions Presented and Reasons for Allowance of Writ of Certiorari

The Circuit Court of Appeals, in reversing the decision of the District Court, has decided (erroneously, we believe) several important questions, which will be stated in and discussed under the following sub-headings:

1. *If directors of a national bank, without warrant or authority, appropriate assets of the bank to their own use and benefit and remain in control of the bank's affairs until it suspends, are they estopped to plead statutes of limitations or laches in an action brought against them by the Federal Deposit Insurance Corporation as statutory receiver of the bank for the purpose of determining the ownership of the converted assets and for an accounting?*

In reversing the District Court and deciding that respondents are entitled to "the benefit of the defenses of laches and of the statute of limitations" the Court of Appeals decided an important question involving the power of Federal courts to exercise their discretion in determining whether the application of the statute of limitations of the forum to a cause of action created by the Federal law [10] is in contravention of the public policy underlying that Federal law. This precise, important and far-reaching Federal question has not been [11] but should be determined by this Court.

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[10] R. S. 5239, as amended by the Act of Mar. 3, 1911, 36 Stat. 1167, U. S. C. Title 12, Sec. 93, text appearing in appendix, p. 25, *infra*.

[11] In *Curtis* v. *Connly* (1921), 257 U. S. 260, there was no dispute as to the applicability of the local statute of limitations, the only issue being when the statute was set in motion, and in *Campbell* v. *City of Haverhill* (1895), 155 U. S. 610 there was no contention that the policy underlying the creation of the federal right was repugnant to the purpose of the statute of limitations.

The decision below seems to conflict with applicable principles recently established by this Court. *Deitrick* v. *Greaney* (1940), 309 U. S. 190, held that in an equity suit brought by the receiver of a national bank to enforce payment of a promissory note, Federal public policy underlying the national bank act would not permit the defendant (a director of the bank) to defeat the purpose of the national bank act by pleading his own violation thereof even though the substantive defense (want of consideration) was cognizable generally under State law and by Federal courts.[12] *D'Oench Duhme, Inc.* v. *Federal Deposit Insurance Corporation,* No. 206, decided March 2, 1942, denied to the defendant (who was not a director) the right asserted to plead defenses generally available (*i. e.,* accommodation and want of consideration) as against the Federal Deposit Insurance Corporation (petitioner here) and the public funds which it administers because the act sought to be relied upon contravened the Federal policy and said "it is the 'evil tendency' of the acts to contravene the policy governing banking transactions which lies at the root of the rule." Since substantive defenses which are considered to be available generally in commercial transactions cannot be successfully invoked where they contravene a well defined Federal policy *a fortiori,* bank directors should not be permitted to plead failure or refusal to perform their duties within the period prescribed by local statutes of limitations which ordinarily are treated as matters of procedure, varying in every jurisdiction, particularly when to so do would defeat rights created by the Federal law and vitally connected with the public interest.

The decision below is in substantial conflict with the decision of the Circuit Court of Appeals for the Ninth

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[12] The Circuit Court of Appeals for the Sixth Circuit followed and extended the rule of the Greaney case to a non-director obligor in *Federal Deposit Insurance Corporation, Receiver* v. *Vest* (1941), 122 F. (2d) 765, Certiorari Denied, 314 U. S. —, No. 748.

Circuit in *Adams, et al.* v. *Clarke* (1927), 22 F. (2d) 957, (also an equity case and presenting facts almost identical with those here involved), wherein it was held that even though the illegal transactions there complained of were disclosed on the books of the bank,[13] nevertheless the defendant directors who (as here) not only held a majority of the capital stock but continued in control of the bank's affairs, would not be permitted to take advantage of inaction for which they alone were responsible.

The Court of Appeals has decided important questions, probably in conflict with rules laid down by this Court, involving the applicability of State statutes of limitation to actions brought by a Federal instrumentality to remove unlawful obstacles to the fulfillment of its statutory duties [14] and to enforce rights beneficially owned not only by the instrumentality itself [15] but also by the depositing public which Congress has sought to protect and safeguard in a separate banking code. These aspects of the decision below seem to conflict with the well-settled principles consistently applied by this Court, viz:

> "state notions of laches and state statutes of limitations have no application to suits by the Government, whether on behalf of Indians or otherwise".

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[13] And therefore presumably known to national bank examiners.

[14] Subsection (1) (4) of Sec. 101 of the Act of Aug. 23, 1935, 49 Stat. 694, U. S. C. Title 12, Sec. 264 (1) (4) reading in part—"It shall be the duty of the Corporation as such receiver to realize upon the assets of such closed bank, having due regard to the condition of credit in the locality; to enforce the individual liability of the stockholders and directors thereof; * * *"

[15] Pursuant to the requirements of subsection (d) of Sec. 101 of the Act of Aug. 23, 1935, 49 Stat. 686-687, U. S. C. Title 12, Sec. 264 (d), the capital stock of the Federal Deposit Insurance Corporation is owned and held as follows: United States $150,000,000.00 and Federal Reserve Banks $139,299,556.99—see 1940 Annual Report of Federal Deposit Insurance Corporation, p. 31. When the subject bank closed it had total deposit liabilities of $181,551 of which $176,631 were insured by the Federal Deposit Insurance Corporation. See 1939 Annual Report of Federal Deposit Insurance Corporation, p. 224.

Jackson County v. *United States* (1939), 308 U. S. 343, 351, and

> "when the United States becomes entitled to a claim, acting in its governmental capacity and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement."

United States v. *Summerlin* (1940), 310 U. S. 414, 417, citing *Chesapeake and D Canal Co.* v. *United States* (1919), 250 U. S. 123, 126.

The creation by the government of a corporate instrumentality to perform governmental functions does not remove from those activities immunities which would have attached if the functions were performed by the government through one of its departments. *Pittman* v. *Home Owners' Loan Corp.* (1939), 308 U. S. 21, 32.

2. *Assuming that the Comptroller of the Currency and the Federal Deposit Insurance Corporation learn that directors of an insured national bank are converting its charged-off assets to their own use, do these supervising authorities have power under the law to institute suit or take other action to remedy the situation?*

The decision of the Court of Appeals on this important and far reaching question dealing with remedies and sanctions available to federal bank supervising authorities as against offending directors has not been but should be settled by this Court. If, as the language of its opinion indicates, the court below meant that the Comptroller could have brought suit against respondents or otherwise "to compel restitution" of the charged-off assets or their avails, then such holding would seem to be in direct contravention of

U. S. C. Title 12, Sec. 484,[16] which for the purposes here involved limits visitorial powers [17] to those authorized by law. Diligent search fails to reveal any statute authorizing the Comptroller to bring action on behalf of an operating bank to recover on or restore assets, or otherwise enforce rights accruing to the bank or any decided case where the Comptroller has undertaken on behalf of an operating bank to enforce the bank's rights or causes of action whether against directors or others.

If the Comptroller has the implied, inherent, or common-law power to bring such a suit, then he may have a correlative duty, burdensome and difficult of administration though it might be. Petitioner understands that the Comptroller has never undertaken to enforce by suit, rights or causes of action on behalf of banks.

Again, if the vesting in the Comptroller of such drastic powers as to

(a) place a national bank in receivership for violations of law [18]

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[16] R. S. 5240 as amended by the Acts of February 19, 1875, 18 Stat. 329 and December 23, 1913, 38 Stat. 271, U. S. C. Title 12, Sec. 484, reading—"No bank shall be subject to any visitorial powers other than such as are authorized by law, or visited in the courts of justice or such shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or either House duly authorized." See *Brinkerhoff* v. *Bostwick*, 88 N. Y. 52, 57, reversing 23 Hun. 237, error dismissed 106 U. S. 3, holding that only provision which authorizes Comptroller to institute any action in relation to the affairs of an operating national bank is Sec. 5239 R. S. (U. S. C. Title 12, Sec. 93).

[17] Visitorial power has been defined to mean "the power to control and arrest abuses, and to enforce a due observance of the statutes." *State* v. *First National Bank* (1912), 61 Or. 551, 123 P. 712.

[18] for failure to fully pay up or restore impairment in capital stock, U. S. C., Title 12, Sec. 55; for failure to correct unlawful number of directors, U. S. C., Title 12, Sec. 71 (a); for failure within six months to dispose of its own stock illegally acquired, U. S. C., Title 12, Sec. 83; for failure to pay a judgment against it within thirty days of rendition, U. S. C., Title 12, Sec. 191; upon termination of status as an insured bank, U. S. C., Title 12, Sec. 264 (i) (2); for false certification of checks, U. S. C., Title 12, Sec. 501, 591.

(b) remove directors or officers for continued unsafe and unsound practices or violations of law [19]
or

(c) publish reports of examination [20]

which were obviously designed to cause a cessation of continued bad practices or violations of law, are to be treated or considered, for the purposes of applying the statute of limitations, the same as common-law or statutory remedies prescribed as the instruments by which rights as between private parties could be protected or enforced, then the invocation of the above-described statutory sanctions or remedies or any of them, in most instances, would ruin or close rather than benefit the bank and still would not restore to the bank the losses suffered by reason of the wrongs previously committed or rights previously violated.

It is assumed that the Court had reference to par. 1 of subsection (i) of the Federal Deposit Insurance Corporation Law [21] when it said—

> "The Federal Deposit Insurance Corporation was given ample power to protect itself and the public".

Sanctions made available to bank supervising authorities for correcting abuses and preserving solvency should not be treated as remedies so that the failure of the supervising authorities (either because of lack of knowledge of the facts or for other reasons satisfactory to the authorities in the

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[19] Sec. 30 of the Act of June 16, 1933, 48 Stat. 193, as amended by Sec. 203 (a) of the Act of Aug. 23, 1935, 49 Stat. 704, U. S. C. Title 12, Sec. 77, text appearing in appendix, p. 26, *infra*.

[20] Sec. 28 (a) of the Act of June 16, 1933, 48 Stat. 192, amending Sec. 5240 R. S., U. S. C. Title 12, Sec. 481.

[21] Subsection (i) (1) of Sec. 101 of the Act of Aug. 23, 1935, 49 Stat. 690-691, U. S. C. Title 12, Sec. 264 (i) (1), text appearing in appendix, pp. 27-28, *infra*.

exercise of the broad discretion vested in them) would deprive either the bank itself or its creditors of a right conferred upon them by the Federal Banking Law.

3. *Is the Comptroller of the Currency or the Federal Deposit Insurance Corporation chargeable as a matter of law with knowledge acquired by their respective bank examiners, which knowledge is not in fact communicated to the supervising officer or agency?*

When the observation of the Court below that—"The national bank examiners reported to the Comptroller of the Currency, * * * "is read in the light of the only evidence on the subject, namely: former cashier White's testimony,[22] and in the light of the remainder of the decision it is apparent that the Court below concluded that knowledge allegedly coming to the attention of the examiners prior to the examination of the bank in March 1936,[23] was imputed as a matter of law (rather than communicated in fact) to the Comptroller of the Currency or the Federal Deposit Insurance Corporation or both. The decision on this point is in substantial conflict with the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Burleigh* (1940), 110 F. (2d) 793, 796.

As pointed out supra, page 18, the statutory remedies or sanctions which are made available to the bank supervising authorities are drastic in their nature and certainly require the exercise of the most prudent and careful discretion before any of them are invoked. To say that knowledge acquired by an examiner (and petitioner does not concede that such knowledge was acquired prior to 1936) but not actually communicated to his superior (whether

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[22] Quoted *supra*, p. 8.

[23] Being the examination referred to in Deputy Comptroller Gough's letter dated April 28, 1936 (R. 202-204) which was within 5 years prior to bringing this suit.

through improper motives, forgetfulness or otherwise) is nevertheless imputable to the superior is tantamount to holding that the Comptroller of the Currency himself and the Board of Directors of the Federal Deposit Insurance Corporation (not the examiners because they have no such powers) have the duty on behalf of banks, creditors and others effected to invoke these drastic measures when they know nothing whatever of the facts.

4. *If the trial court, deciding that an issue of law is determinative of a case, excludes evidence which deals only incidentally with that phase of the case and makes no findings, should the Court of Appeals, which concludes that the case turns on an issue of fact, make its own findings and reverse with directions to enter judgment for appellant, or should it order a new trial so that the issue may be resolved after full opportunity afforded to both parties to introduce competent evidence?*

In reversing the judgment of the trial court with directions to enter judgment for respondents (except as to collections from assets other than the unacceptable assets which were charged off on July 19, 1933), the Court of Appeals decided an important question of appellate court procedure, in conflict with applicable decisions of other circuits and of this Court.

The Court of Appeals for the Third Circuit in *Lehigh Coal & Navigation Co.* v. *United States*, (1920) 266 F. 457, (conforming to answer by this Court to certified question, *Lehigh Coal & Navigation Co.* v. *United States* (1919), 250 U. S. 556), refused to decide an issue of fact on evidence excluded by the trial court despite contentions by both parties (as here) "that the case should not, for exactly opposite reasons, be returned to the District Court for another trial, but could and should be finally disposed of by this

Court." In *Bradley* v. *Hargadine-McKittrick Dry-Goods Co.* (1899), 96 F. 914, the Court of Appeals for the Eighth Circuit held that it was error for an appellate court on reversal to render judgment (based on an issue of fact) for the party who was unsuccessful below where no such issue was submitted at the trial. The Court of Appeals for the Ninth Circuit in *Indemnity Ins. Co. of North America* v. *Levering* (1932), 59 F. (2d) 719 held that it was powerless to order judgment entered in a law action where there are fact issues for a jury or upon stipulation to be determined by the court. The Court of Appeals for the Fifth Circuit in *City of El Paso* v. *West* (1939), 102 F. (2d) 927, reh. den. 104 F. (2d) 96, cer. den. 308 U. S. 587 held that where "there is no evidence especially concerning" the determinative issue of fact and the judgment below was erroneously founded upon issues of law, the appellate court is not in a position to render a different judgment but must order a new trial.

Clarence A. Stewart, Adm. of the Estate of John R. Stewart, Deceased v. *Southern Railway Co.*, No. 161, decided by this Court February 16, 1942, held that since the evidence introduced at the trial was incomplete, and an issue of fact might have been determinative of the case, the Court of Appeals, on re-hearing, should have ordered a new trial rather than directing judgment for the appellant.

Conclusion.

The decision below is in substantial conflict with decisions of other United States Circuit Courts of Appeal, and of this Court. The questions involved are of substantial importance in the field of Federal bank supervision and liquidation as well as of appellate court procedure which call for authoritative rulings by this Court. Therefore it is re-

spectfully submitted that this petition for a writ of certiorari be granted.

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APPENDIX.

Statutes Involved.

Section 5810, Virginia Code.

"Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say: If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years; if it be upon an award or upon a contract in writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and if it be upon any other contract express or implied within three years, unless it be an action by one partner against his co-partner for a settlement of the partnership account, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after; provided that the right of action against the estate of any person hereafter dying, or upon any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued; and provided further that the limitation to an action or other proceeding for money on deposit with a bank or any person or corporation doing a banking business shall not begin to run until a request in writing be made, therefor by check, order, or otherwise."

Section 205 of the Emergency Banking Act (Act of March 9, 1933), 48 Stat. 3, U. S. C. Title 12, Section 205.

If the Comptroller of the Currency becomes satisfied that it may safely be done and that it would be in the public in-

terest, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business subject to such terms, conditions, restrictions and limitations as he may prescribe.

Section 207 of the Emergency Banking Act (Act of March 9, 1933), 48 Stat. 3, U. S. C. Title 12, Section 207.

In any reorganization of any bank under a plan of a kind which, under existing law, requires the consent, as the case may be, (a) of depositors and other creditors or (b) of stockholders or (c) of both depositors and other creditors and stockholders, such reorganization shall become effective only (1) when the Comptroller of the Currency shall be satisfied that the plan of reorganization is fair and equitable as to all depositors, other creditors, and stockholders and is in the public interest and shall have approved the plan subject to such conditions, restrictions, and limitations as he may prescribe and (2) when, after reasonable notice of such reorganization, as the case may require, (A) depositors and other creditors of such bank representing at least 75 per cent in amount of its total deposits and other liabilities as shown by the books of the bank or (B) stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank or (C) both depositors and other creditors representing at least 75 per cent in amount of the total deposits and other liabilities and stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank, shall have consented in writing to the plan of reorganization: *Provided, however,* That claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the 75 per cent thereof as above provided. When such reorganization becomes effective, all books, records, and assets of the bank shall be disposed of in accordance with the provisions of the plan and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may

have been prescribed by the Comptroller of the Currency. In any reorganization which shall have been approved and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization.

R. S. 5239 as amended by the Act of March 3, 1911, 36 Stat. 1167, U. S. C. Title 12, Section 93.

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district, or Territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

Section 30 of the Act of June 16, 1933, 48 Stat. 193, U. S. C. Title 12, Section 77.

Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by

the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided,* That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court.

Subsection (i) (1) of Section 101 of the Banking Act of 1935, (Act of August 23, 1935), 49 Stat. 690, 1, U. S. C., Title 12, Section 264 (i) (1).

Any insured bank (except a national member bank or State member bank) may, upon not less than ninety days'

written notice to the Corporation, and to the Reconstruction Finance Corporation if it owns or holds as pledgee any preferred stock, capital notes, or debentures of such bank, terminate its status as an insured bank. Whenever the board of directors shall find that an insured bank or its directors or trustees have continued unsafe or unsound practices in conducting the business of such bank, or have knowingly or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured bank is subject, the board of directors shall first give to the Comptroller of the Currency in the case of a national bank or a District bank, to the authority having supervision of the bank in the case of a State bank, or to the Board of Governors of the Federal Reserve System in the case of a State member bank, a statement with respect to such practices or violations for the purpose of securing the correction thereof. Unless such correction shall be made within one hundred and twenty days or such shorter period of time as the Comptroller of the Currency, the State authority, or Board of Governors of the Federal Reserve System, as the case may be, shall require, the board of directors, if it shall determine to proceed further, shall give to the bank not less than thirty days' written notice of intention to terminate the status of the bank as an insured bank, and shall fix a time and place for a hearing before the board of directors or before a person designated by it to conduct such hearing, at which evidence may be produced, and upon such evidence the board of directors shall make written findings which shall be conclusive. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank. If the board of directors shall find that any violation specified in such notice has been established, the board of directors may order that the insured status of the bank be terminated on a date subsequent to such finding and to the expiration of the time specified in such notice of intention. The Corporation may publish notice of such termination and the

bank shall give notice of such termination to each of its depositors at his last address of record on the books of the bank, in such manner and at such time as the board of directors may find to be necessary and may order for the protection of depositors. After the termination of the insured status of any bank under the provisions of this paragraph, the insured deposits of each depositor in the bank on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of two years to be insured, and the bank shall continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such bank shall, in all other respects, be subject to the duties and obligations of an insured bank for the period of two years from the date of such termination, and in the event that such bank shall be closed on account of inability to meet the demands of its depositors within such period of two years, the Corporation shall have the same powers and rights with respect to such bank as in case of an insured bank.

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SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 1049

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of the Parksley National Bank,
Petitioner,

vs.

S. C. WHITE, A. J. REW, G. WALTER MAPP, EMMA P. PARSONS, C. B. ROSS, S. F. PARKS, and J. BROOKS MAPP and MARGARET BELL CHANDLER, Administrators of the Estate of John W. Chandler,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF S. C. WHITE, A. J. REW, G. WALTER MAPP AND J. BROOKS MAPP AND MARGARET BELL CHANDLER, ADMINISTRATORS OF THE ESTATE OF JOHN W. CHANDLER.

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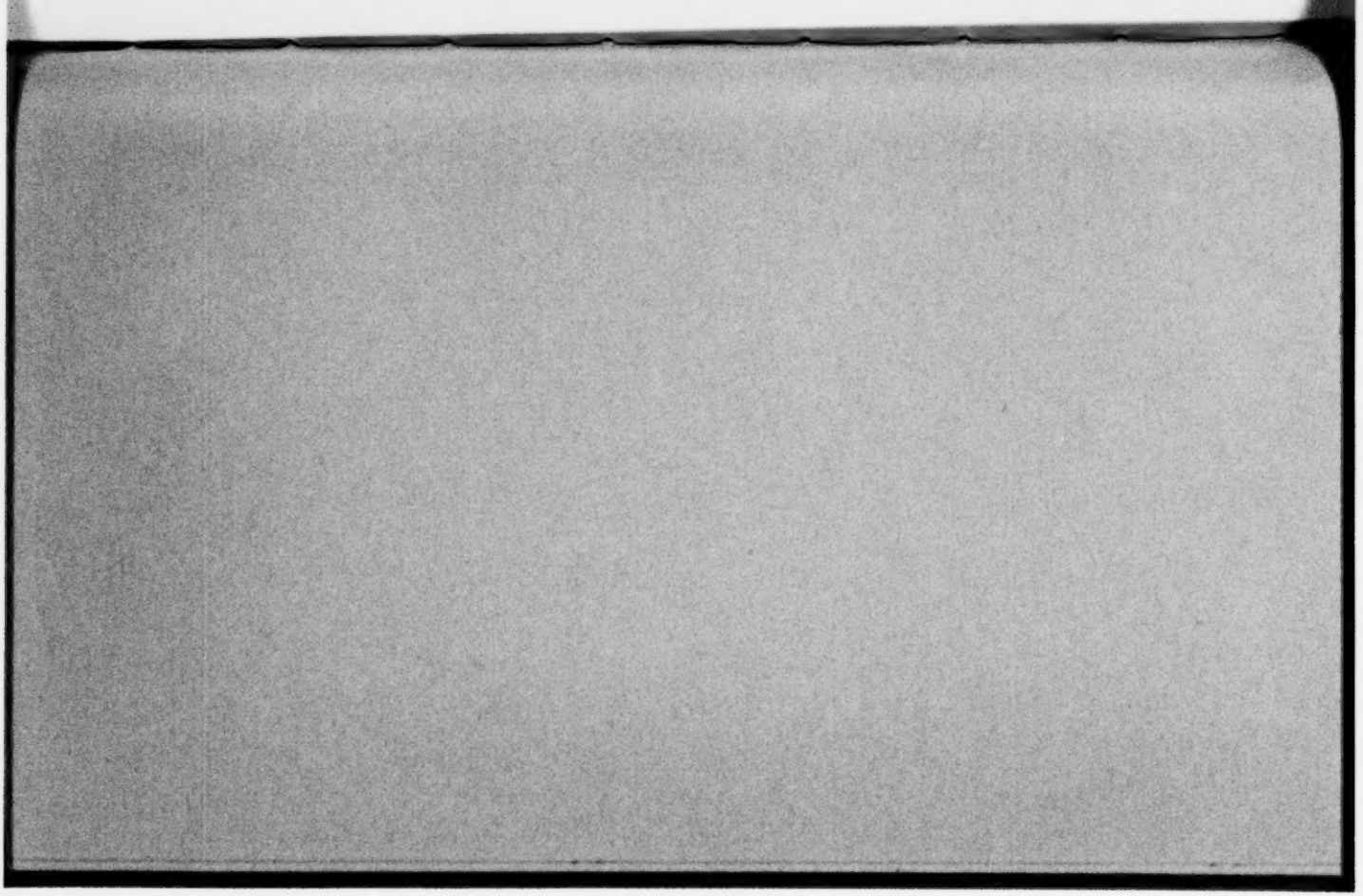

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May it Please the Court:

The respondents, S. C. White, A. J. Rew, G. Walter Mapp and J. Brooks Mapp and Margaret Bell Chandler, Administrators of the Estate of John W. Chandler, in opposing the granting of writ of certiorari petitioned for, respectfully represent:

I.

In order to pass upon the various questions raised in petitioner's application for a writ of certiorari, it is necessary to correct an unintentional mistake contained in the petition, and to give a supplemental statement of the facts upon which the Circuit Court of Appeals rendered the opinion complained of.

The petition (Page 9) states that the Circuit Court of Appeals, by its decision, " - - barred petitioner's right of action (except as to one item of recovery, viz: $1,009.33) - - ". This was an unintentional error on the part of petitioner, as the Circuit Court of Appeals' decision only barred those items collected more than five years prior to the institution of this suit. (R. 241)

SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS.

On May 27, 1933, O. F. Wilde, Examiner, recommended to the Comptroller, " - - subject to the position taken by the Reserve Bank", that the Parksley National Bank re-open upon the following conditions:

> "(1) $50,000.00 unconditional voluntary cash contribution by shareholders to Surplus Fund.
>
> (2) Eliminations as scheduled by the National Bank Examiner in Exhibit 'D' of his report of examination for reorganization purposes as of April 21, 1933, such eliminations totaling $108,945.83.
>
> This will leave the bank with $60,000.00 Capital and $10,200.00 Surplus." (R. 167-169)

This recommendation was approved by the Comptroller. (R. 169)

On June 2, 1933, the Deputy Comptroller wrote White, at that time Conservator of the Parksley National Bank, agreeing to recommend re-opening upon four conditions, the two material of same being as follows:

> "(1) $50,000.00 unconditional voluntary cash contribution by shareholders to Surplus Fund.
>
> (2) Eliminations as scheduled by the National Bank Examiner in Exhibit 'D' of his report of examination for reorganization purposes as of April 21, 1933, such eliminations totaling $108,945.83." (R. 171)

There was no further written communication between White and Comptroller's Office until July 15th, 1933. The undisputed and uncontradicted evidence, however, shows that following receipt of letter of June 2, 1933, Chandler, President, White, Conservator, and Mapp, Director and Attorney, had a conference in Comptroller's Office with Chorpening, Chief Bank Examiner, the Comptroller at that time being in California. (R. 91-92) This conference was about " - - the very last of June - -". (R. 93) Chandler, White and Mapp were told to go to the Federal Reserve Bank in Richmond, that "- - they were the people who would have to furnish us the money if we reopened, and they were the people who would have to keep us open in the event there was any unusual run on the bank, and that if they agreed to reopen us and furnish us the money, it would be satisfactory with his department." (R. 93) A few days later, Chandler, White and Mapp conferred in Richmond, Virginia, with Governor Seay, of the Federal Reserve Bank. (R. 93) Present at this conference were

Governor Seay's First and Second Assistants, and the Assistant Director or Manager of the Reconstruction Finance Corporation. (R. 94) At this conference, it was agreed that if respondents put up $50,000.00 in cash, they "- - were to have all assets charged off up to that time, which amounted to between $62,000 and $63,000." (R. 94)

No-one has ever denied that the above agreement was entered into in good faith by all of the parties concerned.

Following the above agreement, respondent directors raised with considerable difficulty, and put up the $50,000.00 in cash agreed upon. (R. 95)

White, Conservator, having been present at the conference with the officials of the Federal Reserve Bank and of the Reconstruction Finance Corporation, we think it reasonable to assume, and that the assumption is fully borne out by the Record in this case, that in certifying to the Comptroller on July 15, 1933, (R. 172 A) he either paid little or no attention to that part of the certificate which stated that "- - the sum of $50,000.00 has beeen voluntarily contributed by the shareholders - -", or that he construed same as meaning that the money had been put up "voluntarily" rather than as a result of litigation. The same certification in paragraph 5 thereof stated "that the eliminations scheduled by the National Bank Examiner in his report of examination for the purposes of reorganization will be made on the assets of the Bank upon its return to its officers and directors". (R. 172 A)

One respondent director testified that he never knew of this affidavit until this suit was brought. (R. 95) There is nothing in the Record to show that the other directors knew of same.

On July 17, 1933, Seay, Governor of the Federal Reserve Bank of Richmond, (the same party with whom respondents had had the agreement above referred to) wired the bank, authorizing reopening. (R. 230)

On July 19, 1933, Governor Seay issued license to the Bank to reopen. (R. 232 C)

The Bank was opened on July 19, 1933. On that date, two statements of its resources and liabilities were entered in its books, the first showing its financial setup prior to the opening, and the second its financial setup following the opening. (R. 232 B) As will be seen from said statements, "Loans and Discounts" prior to the opening were $474,855.95, and after the opening were $412,551.11. The difference was the "eliminations" or charged off assets in question.

As will be further seen from the above referred to statement, after the opening of the Bank on July 19, 1933, the Bank had,

Capital Stock Paid In	$60,000.00
Surplus Fund	10,000.00
Undivided Profits	10,041.55
Total	$80,041.55 (R. 232 B)

The Comptroller had approved on May 27, 1933, a recommendation that the Bank be permitted to reopen with a $60,000.00 Capital and $10,200.00 Surplus. (R. 167-169)

In other words, respondent directors at the time of reopening the Bank, had added to its Capital, Surplus and Undivided Profits $9,841.55 more than had been required by the Comptroller.

Nowhere on the daily statement of July 19, 1933, of the Bank's resources after its reopening are the charged off "Loans and Discounts" aggregating $62,304.84 shown as an asset of the Bank. (R. 232 B)

White, Cashier, during the more than five and one-half intervening years between the reopening of the Bank on July 19, 1933, and its final closing on May 18, 1939, made and placed in the Bank's record daily statements showing the Bank's assets and liabilities. The Liquidator did not find the charged off assets, aggregating approximately $62,000.00 listed as assets of the Bank in any of these daily statements. (R. 85) An itemized list of the charged off assets is shown in the Record, page 165.

Following July 19, 1933, all collections by White upon the charged off items were carried on the Bank's individual ledger under the caption of "S. C. White, Special D". (R. 59) Also carried in this account were numerous collections on collateral of the face value of $30,000.00, which Chandler, President, had put up at the time the directors borrowed the $50,000.00, with which they purchased the charged off assets. (R. 87)

The charged off assets in question were found by the Liquidator in the Bank's safe, in an envelope on which was written "Reconstruction Finance Corporation". (R. 85) In the same envelope was a letter from the Reconstruction Finance Corporation to S. C. White, Cashier, written during February, 1934. (R. 85) This letter is defendants' "Exhibit A", dated February 23, 1934, (R. 229) and is as follows:

"Mr. S. C. White, Cashier,
Parksley National Bank,
Parksley,
Virginia.

Dear Mr. White:

You will undoubtedly recall our conversation on February 15th when we discussed the fact that $50,000 of rejected assets had been sold to the directors, whereas we had previously been under the impression that the $50,000 paid in by the directors had been a contribution.

The Board has amended the resolution authorizing the purchase of the Preferred Stock to allow a decrease of assets in the amount of $50,000 from that shown by the last National Bank Examiner's report.

Very truly yours,

E. W. Staples
E. R. Staples
Assistant Manager"

AHG:mcg

One of respondent directors testified that following July 19, 1933, he did not learn that there was any "- - question on the part of the Government as to the ownership of these charged off notes", until told by White, Cashier, that some question had been raised by Mr. Staples of the Reconstruction Finance Corporation. He was later shown the above referred to "Exhibit A" from Mr. Staples as Assistant Manager of the Reconstruction Finance Corporation to White, Cashier. (R. 96)

Following receipt of the above referred to letter, the directors at a meeting held November 13, 1934, had entered in their Minute Book a minute showing the purchase of the charged off assets. (R. 89)

The last and only other communication received by Bank or any of its officials from Comptroller or anyone in authority, was letter of April 28, 1936, from the Deputy Comptroller to the Board of Directors of the Bank. (R. 202-203) This letter was not answered by directors and no further demand was made by Comptroller in connection with charged off assets prior to closing of Bank approximately three years later. Upon this point, White, Cashier, testified as follows:

> "Q. Mr. White, apart from the letter that has been offered in evidence from the Comptroller, dated sometime during 1936, was any demand ever made upon you, either as director or individual, or any other way, for the payment of the money collected from these charged-off assets prior to the institution of this suit, and, if so, how long prior?
>
> A. No, sir, no demand at all. We had from two to three examinations each year from 1933 until the bank closed, and part of that time the Chief National Bank Examiner put us on a special list of examination. There was no criticism ever stated in there. I am speaking of the reports by the Examiner. There wasn't anything, whatsoever, regarding the charged-off items of 1933." (R. 135-136)

On December 16, 1937, the Bank's capital was impaired in the amount of $37,384.87. (R. 234 A) The Comptroller wrote the Board of Directors, calling their attention to the impairment and directing that proper notices be given the stockholders of same. This letter contained no reference or demand in connection with charged off assets in question. It contained this significant paragraph:

> "If the directors, or other shareholders, will voluntarily restore the capital by purchasing for cash the worthless assets, or making cash contribu-

tions sufficient to provide for the deficit, the formal notice of impairment of capital may be considered inoperative." (R. 234 A)

From the date of the Bank's reopening on July 19, 1933, until the date of its closing on May 18, 1939, all of the Bank Examiners could see from the Bank's records that the respondents were claiming the charged off assets. During this period, from two to four examinations were being made each year. (R. 141) In addition to this constructive notice, the positive, uncontradicted evidence was that all of the Bank Examiners had actual knowledge that respondent directors were claiming these assets. Upon this point, respondent Mapp testified:

"Q. Did Mr. Williams, or any other bank examiner, ever raise any question as to the ownership of these notes?

A. There never was a question raised. Every one of them knew it." (R. 97)

Respondents offered to show by Ross, one of respondent directors that he talked with Williams, Bank Examiner, "- - on several occasions with reference to these charged off notes prior to the time this money was put up, and on several occasions afterwards, in which conversations Mr. Williams admitted to him that the parties putting up this cash were entitled to these charged off notes". (R. 124)

In addition to defendant directors, there were fifteen other stockholders, who owned 14% of the Banks stock (R. 141) continuously from the reopening of the Bank until its final closing. The uncontradicted evidence was that these additional stockholders had actual knowledge of the fact that

respondents purchased the charged off assets for $50,000.00, and had this knowledge at the time of the purchase. (R. 138-139).

Two directors were elected between the reopening and final closing of the Bank, one of whom was later elected and serving as President at the time of the Bank's final closing. Neither of these directors are respondents. (R. 132-133) There was never any concealment of any records of the Bank between its reopening and final closing. Upon this point, White, Cashier, testified:

> "Q. Mr. White, did you ever at any time after July 19, 1933, conceal any records of the bank, or refuse to show any records in the bank, to any stockholder in the bank, or to any governmental officials?
>
> A. No, sir.
>
> Q. Were they at all times continuously open between July 19, 1933, and the appointment of Mr. Hamilton, as liquidator?
>
> A. Yes, sir. We tried to render them assistance, and get all the cooperation we could from all of the stockholders." (R. 141-142)

Petitioner did not insure Bank until after its reopening on July 19, 1933. An examination of Bank's statement made on that day after the reopening (R. 232 B) would have shown petitioner that charged off assets were not owned by Bank. An examination of the Bank's records on any day thereafter would have given the same information.

No fraud, intentional wrong doing, or concealment by any of respondents is alleged or proven. On the contrary,

the original complaint alleged that respondents were acting "- - under a claim of legal right - -". (R. 3)

II.

SUMMARY OF UNCONTRADICTED FACTS PROVEN AS SHOWN BY OPINION OF CIRCUIT COURT OF APPEALS.

Judge Parker, in rendering the opinion of the Circuit Court of Appeals, summarized the uncontradicted facts proven in part as follows:

> "These (the charged off assets) were charged off at the time of the reopening of the bank on July 19th; and the papers themselves were separated from the other assets of the bank by the defendant White, who kept them in an envelope to themselves and held them under claim of right for the benefit of himself and the other directors. Collections were made on these charged off assets from time to time aggregating a little in excess of $12,000, were deposited by White in a special account which he maintained in his own name as trustee and were immediately disbursed for the individual benefit of the directors, who claimed to be the rightful owners thereof.
>
> The evidence shows without contradiction that all of the stockholders of the bank knew from the beginning that the defendants were claiming to be the owners of these charged off assets, that there were fifteen stockholders of the bank other than the interested directors and that they owned 14 per cent of the bank's stock. There is evidence, also, that the fact that the directors were claiming these assets was well known from the beginning to the bank examiners who examined the bank for the Comptroller of the

Currency and for the Federal Deposit Insurance Corporation, that a representative of the Reconstruction Finance Corporation referred to it in a letter in 1934 and that the Deputy Comptroller of the Currency referred to it in a letter in 1936. Suit was not instituted to recover the assets or to challenge the right of the defendants in same, however, until January 11, 1940." (R. 238-239)

And again, in the same opinion:

"There was actual knowledge on the part of all the stockholders, including fifteen independent stockholders owning fourteen percent of the stock; and there was actual knowledge, also, on the part of the bank examiners representing the Comptroller of the Currency and the Federal Deposit Insurance Corporation. There was no fraudulent concealment or other exceptional circumstance to prevent the running of the statute; but the assets were openly taken under claim of right and pursuant to an agreement which, while it could not affect the rights of the bank as fixed by the order of the Comptroller of the Currency, was thoroughly understood, not only by the other stockholders, but also by those whose duty it was to protect the interest of depositors and other creditors, including the examiners for the Federal Deposit Insurance Corporation, which, as a guarantor of the Bank's deposits, was most vitally concerned in the preservation of its assets. Notice to all of the stockholders of a matter so intimately affecting their rights must be deemed notice to the corporation. - - - - - - - - - - . What we have here, however, is more than mere notice to the corporation. We have actual knowledge on the part of all the stockholders of the corporation who would be entitled to complain of the wrong, coupled with actual knowledge on the part of bank examiners whose duty it is to protect depositors and the public. Under such circumstances,

we think that there is no escaping the conclusion that, within the meaning of the quoted provision of section 5811 of the Code, the fraud or mistake involved in the transfer of the assets was 'discovered or by the exercise of due diligence ought to have been discovered' so as to set the statute of limitations running.

In reaching this conclusion we have not taken account of the rather significant facts that the transfer of assets was shown by the minutes of a directors' meeting as early as 1934, that a representative of the Reconstruction Finance Corporation referred to it in a letter in 1934, that the Comptroller of the Currency complained of it in a letter in 1936, and that two independent members were elected to the Board of Directors, one of whom was chosen president, some time prior to the bank's failure. - - - - - - The evidence shows beyond question that they were claiming the assets adversely, to the knowledge of the independent stockholders and the bank examiners, and it is clear that they did not fully appreciate the meaning of 'voluntary contribution'. Nothing is shown to have been said by them with respect to the charged off assets inconsistent with their adverse claim thereto." (R. 242-244)

III.

ARGUMENT

The decisive question in the instant case is whether directors of a Bank are trustees of an express trust.

A few of the earlier Federal cases hold that the directors of a Bank are trustees of an express trust. In so holding, however, they simply follow the decisions by the State Courts in their respective districts. The great majority of the State Courts, including Virginia, hold that the directors of a Bank

are not trustees of an express trust. The Federal Courts, including the Supreme Court of the United States, follow the holdings of the State Courts in their various districts.

In other words, the only conflict is in the decisions of the State Courts, and a large majority of these decisions, hold that Bank directors are not trustees of an express trust. There is no conflict in the Federal decisions, which simply follow in their various districts the holdings of the State Courts.

The few State or Federal cases following the minority rule were in nearly every instance decided many years ago. Practically all recent decisions, both State and Federal, follow the majority rule relied upon by respondents. Under the majority rule, Bank directors not being trustees of an express trust, can rely upon either a plea of the statute of limitations or a plea of laches.

Virginia follows the majority rule. In *Winston* v. *Gordon*, 115 Va. 899, Keith, President, in delivering the Court's opinion, says:

> "'In this case there is neither proof nor averment of fraud, nor of any act done designed to conceal the existence of liability, or which operated in any way upon the plaintiffs to prevent or delay the bringing of suit. We think, therefore, that the circuit court was right in saying that the statute of limitations began to run from the time the alleged wrongs, if any, were committed, but that the statute of five years, and not of three, should have been adopted by the court.'
>
> 'To recapitulate briefly: As to the statute of limitations, we are of opinion, first, that the directors of the Traders and Truckers Bank were not express

trustees, and may, therefore, plead the statute of limitations; - -'."

See also *Williams* v. *Fidelity Loan and Savings Co.*, 142 Va. 43, especially page 70.

"'As directors and officers of a national bank are mere agents of the bank to discharge the duties imposed on it and on them by law, and not trustees of an express trust as to the property of the bank but of an implied trust created by operation of law for the bank, its stockholders, and its creditors, the statutes of limitation and the doctrine of laches may be invoked in their defense.'" 9 Corpus Juris Secundum, p. 1170.

In *Cooper* v. *Hill*, 94 Fed. 582, suit was brought by the receiver of a national bank of Denver, Colorado, against the directors thereof, to compel the restoration of a trust fund which the directors had unlawfully diverted in the development of a mine. The Colorado statute of limitations was plead by the directors.

In rendering the Court's opinion, Circuit Judge Sanborn says:

"The question presented then is, are the officers of a national bank the trustees of an express trust for its creditors and stockholders, within the meaning of this rule? - - - - - - The trust with which the property of the bank is impressed in their hands arises from the law, and from their acceptance of the office they hold. It is not an express trust arising from contract or privity, but an implied or resulting trust created by the operation of the law upon their official relation to the bank. The result is that the officers of a national bank are not the trustees of an

express, but of an implied, trust for the bank and its stockholders and creditors, and statutes of limitation and the doctrine of laches may be invoked in their defense."

In *Curtis* v. *Connly*, 257 U. S. 260, suit was brought by the receiver of a National Bank against the directors for losses sustained by illegal dividends and improvident loans. The statute of limitations was plead. The receiver contended that the case was within an exception in the State statute to the effect that, where the existence of the cause of action was concealed, by actual misrepresentation of the wrong doer, time did not begin to run until actual discovery. The Supreme Court denied the claim, saying in part:

> " 'The bank of course must be charged with knowledge of what appeared upon its books. It owned them; its stockholders had a right to inspect them. *Guthrie* v. *Harkness*, 199 U. S. 148, 26 S. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433. Hence it would seem, as suggested by the District Judge, that so far as concerns investments of a kind that national banks are not allowed to make, the bank was chargeable with knowledge from the beginning and can file no claim upon them now. * * * Three new directors came upon the board before August 3, 1910. It is alleged unmistakably in the bill that all the directors were chargeable with notice and did in fact know that the dividends were paid out of assets and not earned and that the improper loans should be recalled. Even if otherwise the statute of limitations would not have run, which we do not imply, knowledge of the facts by the new directors was knowledge by the bank, and none the less that according to the bill they in their turn were unfaithful. It is not alleged that they conspired with the defendants whose case we are considering. They

> came to the board as the eyes of the bank. Any one of them having notice was bound to do what he could to avert or diminish the loss. Indeed the bill seeks to charge one of them for not having done his duty. Notice to an officer, in the line of his duty, was notice to the bank. A single director like a single stockholder could proceed in the courts. *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 381, 403. * * * The statute of limitations must not be applied so narrowly that business men will be afraid to take directorships, and however this bill be read in its details it appears to us not to charge enough to deprive the appellees of the protection of the act.' "

In *Hughes* v. *Reed* et als, 46 Fed. Rep. (2nd Series) 435, the Court held that the period between January 10, 1922, and May 21, 1922, was a reasonable time for the discovery of past derelictions by the directors, and sustained their plea of the statute of limitations as to all losses occurring prior to May 21, 1922.

See also upon this same point:

McNair v. *Burt* et al, C. C. A. 5th Circuit decided February 7, 1934, reported in 68 Fed. Rep. (2nd Series) 814

Corsicana Nat'l Bank v. *Johnson*, 251 U. S. 68, 40 S. Ct. 82, 64 L. Ed. 141.

Where there is no applicable Federal statute of limitations, the appropriate State statute on that subject controls. *McClaine* v. *Hankin*, 197 U. S. 154.

> " - - - concealment by mere silence is not enough. There must be some trick or connivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence and the means

> of knowledge are the same thing in effect as knowledge itself." *Anderson* v. *Gailey*, 33 Fed. (2d) page 589.

In the instant case, concealment is neither alleged nor proven.

IV

QUESTIONS PRESENTED

The Questions Presented in the petition (Pages 13-21) will, for convenience of reference, be restated below, each question preceding the discussion thereof. Their order in the petition is preserved herein:

FIRST

> "If directors of a national bank, without warrant or authority, appropriate assets of the bank to their own use and benefit and remain in control of the bank's affairs until it suspends, are they estopped to plead statutes of limitations or laches in an action brought against them by the Federal Deposit Insurance Corporation as statutory receiver of the bank for the purpose of determining the ownership of the converted assets and for an accounting?"

The first case under this question relied upon by petitioner *Deitrick* v. *Greaney* (1940) 309 U. S. 190. In said case, the defendant director entered into an agreement which he knew was illegal by Federal statute. The decision was based upon this fact. In delivering its opinion, the Court said:

> "Here it is the reach of the statute making respondent's acts illegal and affording protection from them to the creditors which governs our decision."

And again in the same opinion,

> "But it is the federal statute which condemns as unlawful respondent's acts."

In the instant case, respondents were violating no Federal statute. They had a perfect right to purchase the charged off assets for $50,000.00 cash. The best evidence of this is that the Comptroller over a year later offered to sell to the directors or other shareholders other charged off assets.

The second case relied upon by petitioner under this question is *D'Oench Duhme, Inc.* v. *Federal Deposit Insurance Corporation,* No. 206, decided March 2, 1942, reported in Supreme Court Reporter of March 15, 1942, at page 676.

In the last mentioned case, the facts upon which the decision is based are totally different from those in the instant case. In *D'Oench Duhme, Inc.* v. *Federal Deposit Insurance Corporation,* as was said by Mr. Justice Jackson,

> " - - the note was a sham knowingly given to enable the bank to conceal the worthlessness of certain bonds which it has bought from the maker, a broker. This deception was not for the single day on which the note was delivered; its purpose and its effect was to operate as a continuing inducement to existing creditors and to those who might become creditors to rely on this note as a $5,000 item counting towards its solvency."

In order to continue the original deception, certain interest payments were made for the purpose of keeping the note "as live paper". As was said, too, by Mr. Justice Douglas, "It is indeed clear that at no time prior to the demand for payment did respondent know that the note was not genuine." It is equally

true that neither on the day the Federal Deposit Insurance Corporation insured the Bank in question nor on any subsequent day could the Corporation learn from an examination of the Bank's records that the note in question was spurious.

In the instant case, on the very day that petitioner insured the Parksley National Bank, an examination of its records would have shown that the charged off assets in question were not assets of the Bank. An examination of the Bank's records on any day between July 19, 1933, and its closing on May 18, 1939, would have given this same information. Not only is this true, but as was said by Mr. Justice Parker in the instant case:

> "There was actual knowledge on the part of all the stockholders, including fifteen independent stockholders owning fourteen per cent of the stock; and there was actual knowledge, also, on the part of the bank examiners representing the Comptroller of the Currency and the Federal Deposit Insurance Corporation."

D'Oench Duhme, Inc. v. *Federal Deposit Insurance Corporation,* Supra, in no way changed the long established legal principles in cases similar to the instant case. Mr. Justice Jackson says:

> "No doubt many questions as to the liability of parties to commercial paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted. The Corporation would succeed only to the rights which the bank itself acquired where ordinary and good-faith commercial transactions are involved."

As was stated, too, by Mr. Justice Frankfurter, there

was "nothing in Missouri Statutes or decisions to warrant us in setting aside this ruling".

Not to sustain the Circuit Court's ruling in the instant case would be in direct conflict with the Virginia Statute of Limitation and the Virginia and Federal decisions above referred to. See Section 5818 of the Virginia Code quoted in the appendix. There are only two Virginia Statutes of Limitations applicable to this case, same being Section 5818 of the Virginia Code, supra, and Section 5810 of the Virginia Code, both of which are quoted in the appendix hereto.

The third case cited under this question is *Adams et al* v. *Clarke* (1927) 22 F. (2 d) 957. Not only is the decision in said case not in conflict with the decision by the Circuit Court in the instant case, but in *Adams et al* v. *Clarke*, the Court expressly says: "In like manner, we accept the further view that such causes of action are subject to the application of State Statutes of Limitation." In rendering its opinion, the Court cites with approval *Curtis* v. *Connly*, Supra, and *Cooper* v. *Hill*, Supra, both relied upon by respondents in the instant case. We deem it unnecessary to further comment upon *Adams et al* v. *Clarke*, Supra.

The remaining cases cited by petitioner in connection with this question simply hold that statutes of limitation do not apply to suits brought by the Government. The instant suit is neither a suit by the Government nor by " - - a corporate instrumentality" performing "- - governmental functions - -". The lending of money by a bank is not a "- - governmental function - -", within the meaning of the decisions referred to by petitioner.

SECOND

"Assuming that the Comptroller of the

> Currency and the Federal Deposit Insurance Corporation learn that directors of an insured national bank are converting its charged-off assets to their own use, do these supervising authorities have power under the law to institute suit or take other action to remedy the situation?"

In support of its contention in connection with this question, petitioner cites no authority.

Perhaps the clearest answer to petitioner's contention is the letter of April 28, 1936, (R. 202-204) from the Deputy Comptroller to the Board of Directors of the Parksley National Bank. In said letter, the Deputy Comptroller says in part as follows:

> "Your attention is called to the fact that recent banking legislation empowers the Comptroller of the Currency to publish reports of examinations if matters criticized in those examinations are not corrected within a certain time after the directors of the bank have been notified of the need for correction, and further provides for the removal of officers who continue violations of law and unsafe or unsound banking practices after receiving warning from the Comptroller to discontinue such violations and unsafe or unsound banking practices."

In addition to these general powers, as has heretofore been pointed out, the instant suit could have been brought by any one of the non-participating fifteen stockholders during the Bank's solvency, and by any creditor, including petitioner, after the Bank became insolvent. With both constructive and actual knowledge of the facts, neither the stockholders nor any creditor instituted suit.

THIRD

> "Is the Comptroller of the Currency or the Federal Deposit Insurance Corporation chargeable as a matter of law with knowledge acquired by their respective bank examiners, which knowledge is not in fact communicated to the supervising officer or agency?"

Unfortunately, none of Counsel for respondents have, or have been able to get access to the only case cited by petitioner, in connection with this question, that is, *United States* v. *Burleigh* (1940), 110 F. (2d) 793, 796. We are unable, therefore, to comment directly upon said case. In *Hughes* v. *Reed et als*, Supra, C. C. Judge McDermott, in referring to Bank Examiners says:

> "Furthermore, the National Bank Examiners, the real 'eyes of the bank,' had access to the books, repeatedly examined them, and had actual knowledge of the acts complained of.

In the instant case, the Record affirmatively shows that the Bank not only was examined twice a year as provided by Statute, but that during a part of the time between its reopening in 1933, and its final closing in 1939, it was put "- - on a list of special examinations". (R. 136). Nowhere in the Record are "improper motives" attributed to any Bank Examiner. It is to be presumed that in compliance with their official duty, they reported to the Comptroller.

In the letter hereinbefore referred to of April 28, 1936, from the Comptroller to the Board of Directors, (R. 202-204) at which time the Bank's capital was impaired, the Comptroller stated that he had been told of respondents' claim in connection with charged off assets. In spite of the fact that respondents

neither restored nor promised to restore collections on said assets, Comptroller took no action. It is naturally to be concluded, therefore, that he would have taken none during the solvency of the Bank following its reopening in 1933.

FOURTH

> "If the trial court, deciding that an issue of law is determinative of a case, excludes evidence which deals only incidentally with that phase of the case and makes no findings, should the Court of Appeals, which concludes that the case turns on an issue of fact, make its own findings and reverse with directions to enter judgment for appellant, or should it order a new trial so that the issue may be resolved after full opportunity afforded to both parties to introduce competent evidence?"

Without prolonging this brief by a detailed reference to each of the cases cited by petitioner in connection with this fourth question, in answer thereto, we deem it only necessary to call the Court's attention to the following facts as disclosed by the Record:

(a) Positive, unequivocal evidence was offered in behalf of respondents before the Jury, without objection or exception by petitioner, showing actual knowledge on the part of all of the stockholders of respondents' claim to the assets in question. (R. 137-142)

(b) As has already been pointed out in detail, the Bank Examiners likewise had continuous notice of respondents' claim. This evidence, too, was before the Jury without objection or exception. (R. 136)

(c) The Record conclusively shows that there was

not the slightest doubt in the mind of the District Court, but that the evidence offered in behalf of respondents was sufficient to sustain their defense of the Statute of Limitations. The very fact that the District Court took under advisement its ruling upon the pleas of the Statute, in itself, shows that the District Court felt that sufficient evidence had been offered and admitted in behalf of respondents in support of their plea. Not only is this true, but the District Court, in sustaining petitioner's motion for a directed verdict, stated in part as follows:

> "The jury will have to return a verdict of that. But there is the question in my mind to leave that verdict open to this extent: By closing, to say, 'Subject to the Court's later determination on the pleas of the statute of limitation." (R. 154)

If there was the slightest question in the minds of Counsel for petitioner that there was not sufficient evidence to sustain respondents' plea of the Statute of Limitations, then it was the duty of Counsel for petitioner to either except or to ask that said question be made an issue before the Jury. Counsel for petitioner did neither. In the exhaustive brief filed in behalf of petitioner in the Circuit Court of Appeals, nowhere is it suggested that there was not sufficient evidence offered and admitted to sustain respondents' defense of the Statute of Limitations. If the objection had been made, it would, in view of the evidence offered, have been without merit. After final judgment by both the District Court and the United States Circuit Court of Appeals, it is now certainly too late for petitioner to raise this question.

FIVE

Having answered the questions raised by petitioner, Counsel for respondents respectfully desire to recapitulate as follows:

(a) Can Directors of a Bank plead the Statute of Limitations? Yes. See:

Cooper v. *Hill*, supra
Winston v. *Gordon*, supra
Williams v. *Fidelity Loan & Savings Co.*, supra
Hughes v. *Reed*, supra
Curtis v. *Connly*, supra
Corsicana National Bank v. *Johnson*, supra
McNair v. *Burt*, supra
Anderson v. *Gailey*, supra

(b) Can the Statute of Limitations be plead in a chancery suit? Yes. See:

Winston v. *Gordon*, supra
Cooper v. *Hill*, supra
Hughes v. *Reed*, supra
Curtis v. *Connly*, supra
Anderson v. *Gailey*, supra

(c) When does the statute commence to run as to Directors of a Bank? At the time the act complained of is committed. See:

Winston v. *Gordon*, supra
Corsicana National Bank v. *Johnson*, supra
Hughes v. *Reed*, supra
Cooper v. *Hill*, supra
Curtis v. *Connly*, supra
McNair v. *Burt*, supra
Anderson v. *Gailey*, supra

(d) In a case of this kind, who could have brought suit before appointment of Receiver? In the event of insolvency any creditor could sue; in the event of solvency, any single

Director (there were two new Directors, one of whom was President of the Bank, and neither of whom is defendant in the instant suit), or any single stockholder could sue, and the evidence shows that 15% of the stock was owned by parties not defendants in the instant suit.

The authorities also hold that "the Comptroller had ample power to compel restitution, resignation or a receivership." See:

Winston v. *Gordon*, supra
Curtis v. *Connly*, supra
Hughes v. *Reed*, supra
McNair v. *Burt*, supra

CONCLUSION

Upon the record here presented, respondents say:

(1) That the decision of the Circuit Court of Appeals in the instant case is not in conflict with the decision of another Circuit Court of Appeals on the same matter.

(2) That the decision complained of is not in conflict with applicable local decisions in Virginia.

(3) That the decision of the Circuit Court of Appeals in the instant case was upon a question which had been passed upon many times by the Supreme Court of the United States.

(4) That the decision of the Circuit Court of Appeals was not in conflict with applicable decisions of the Supreme Court of the United States, but on the contrary, was based upon and followed those decisions.

(5) That the writ of certiorari prayed for in the petition should be accordingly denied.

Respectfully submitted,

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APPENDIX

Statutes Involved

Section 5810, Virginia Code

"Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say: If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years; if it be upon an award or upon a contract in writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and if it be upon any other contract express or implied within three years, unless it be an action by one partner against his co-partner for a settlement of the partnership account, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after; provided that the right of action against the estate of any person hereafter dying, or upon any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued; and provided further that

the limitation to an action or other proceeding for money on deposit with a bank or any person or corporation doing a banking business shall not begin to run until a request in writing be made, therefor by check, order, or otherwise."

Section 5818, Virginia Code

"Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued."